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In the Supreme Court of the United States

OCTOBER TERM, 1961

CAMDEN TRUST COMPANY, PETITIONER

v.

RAY M. GIDNEY, COMPTROLLER OF THE CURRENCY, AND DELAWARE VALLEY NATIONAL BANK OF DELAWARE RESPONDENTS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENT, COMPTROLLER OF THE CURRENCY, IN OPPOSITION

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CAMDEN TRUST COMPANY, PETITIONER

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RAY M. GIDNEY, COMPTROLLER OF THE CURRENCY, AND DELAWARE VALLEY NATIONAL BANK OF DELAWARE TOWNSHIP

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OPINIONS BELOW

The district court (R. 107)[1] filed no opinion. The opinions of the court of appeals (Pet. App. 1a-9a) are not yet reported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 10a) was entered on January 18, 1962. A timely peti-

[1] Except where otherwise indicated, the record references herein are to the Joint Appendix filed in the court below.

tion for rehearing *en banc* was denied by order dated February 20, 1962 (Pet. App. 11a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether limitations in New Jersey law applicable to branch banking limit the discretionary authority of the Comptroller of the Currency to approve and charter a new national bank that will be affiliated with an existing national bank.

STATUTES INVOLVED

Pertinent provisions of the National Bank Act, as amended, are set forth in the Appendix, *infra*, pp. 14-16.

STATEMENT

Pursuant to the National Bank Act, 12 U.S.C. 21-28, an application to the Comptroller of the Currency, under date of February 23, 1960, was executed and filed by nine individuals seeking the Comptroller's approval to organize a new national bank in Delaware Township, Camden County, New Jersey (R. 7, 39-40). At the time of application, the individual applicants were serving as directors of the Haddonfield National Bank. The application to organize the new bank was processed by the Comptroller's office in the usual way, as outlined in 12 C.F.R. 4.1. A field investigation was conducted by representatives of the Comptroller, joined by representatives of the Federal Reserve Board and the Federal Deposit Insurance Corporation. On November 21, 1960, the Comptroller advised the applicants that he had given his preliminary ap-

proval of their application to organize a new national bank under the title, "Delaware Valley National Bank of Delaware Township." (R. 41.)

The Articles of Association and the Organization Certificate of the Delaware Valley National Bank were executed on January 19, 1961 (R. 53-55), and were subsequently filed with the Comptroller; Delaware Valley thereupon became a body corporate (see 12 U.S.C. 24, App., *infra*, p. 44). Pursuant to the terms of 12 U.S.C. 27, (App., *infra*, p. 15), before Delaware Valley can commence the business of banking, the Comptroller must inquire into the conditions of the Association and determine whether the Association is lawfully entitled to commence the business of banking; if so, the Comptroller shall give to the Association a certificate that the Association has complied with the provisions of the National Bank Act and is authorized to commence the banking business.

On January 3, 1961, the Camden Trust Company, a State bank organized under the laws of New Jersey, brought suit in the United States District Court for the District of Columbia seeking declaratory relief and an injunction prohibiting the Comptroller from issuing a certificate of authority to Delaware Valley (R. 1, 5-10). The complaint charged that there was no need or justification for another bank in the area now being served by a branch bank of the Camden Trust Company; that the application preliminarily approved by the Comptroller was a manifest subterfuge to circumvent the provisions and purposes of the National Bank Act and New Jersey law by introducing a fa-

cility in the Delaware Township that "* * * for all practical purposes constitute a branch facility of the Haddonfield National Bank. Issue of a Certificate of Authority in such a case," it was asserted, "is contrary to law, beyond the defendants' authority, and a clear abuse of his discretion" (R. 8). A prayer for a temporary restraining order (R. 9) was abandoned by Camden when the Comptroller agreed to an administrative stay.

On April 6, 1961, the Delaware Valley National Bank was given leave to intervene as a party-defendant (R. 28, 30). On cross-motions for summary judgment the district court, on August 12, 1961, sustained the motions of the Comptroller and Intervenor (R. 102). The district court concluded that the Comptroller "* * * was authorized, pursuant to the provisions of Section 21-28 of the National Bank Act [12 U.S.S. 21-28] * * * to approve, within the exercise of his discretion, the establishment of the 'Intervenor'" and that "the exercise of this discretion is not subject to judicial review."[2] The district court further held that the branch banking provisions of the National Bank Act (12 U.S.C. 36, App., *infra*, p. 16) are inapplicable to the case and that the plaintiff lacked standing to challenge the Intervenor's corporate

[2] Though the government did not deem it necessary in the court of appeals to argue at length the various alternative grounds for the decision of the district court, the government reserves the right to argue as an alternative ground for affirming the judgment below that petitioner, a state bank complaining only of possible competitive injury, has no legal standing to challenge the authority of the Comptroller to charter a new national bank.

existence or the defendants' authority to approve the establishment of a new bank (R. 106).

On Camden's appeal,[3] the judgment of the district court was affirmed, Judge Bastian dissenting.[4] The court of appeals held, contrary to Camden's argument, that both as a matter of fact and as a matter of law, Delaware Valley was not a "branch bank" within the meaning or intent of the branch banking provisions of the National Bank Act (12 U.S.C. 36); that 12 U.S.C. 36 has no applicability to the fact situation disclosed on the record in this case; and, adverting to the fact that Delaware Valley was affiliated with Haddonfield National Bank through common directors and partial stock ownership, the court stated (Pet. App. 7a):

> It is not within our province to pass upon the desirability *vel non* of permitting a national bank to have an "affiliate." * * *. If such an affiliate is to be denied status [as a national bank], Congress must clearly say so. It is sufficient for our disposition of the present controversy to observe that what was done was within the authority conferred by the existing statutes. * * *

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[3] On Camden's motion, the district court restrained the Comptroller from issuing to Delaware Valley a certificate of authority to commence the business of banking pending the outcome of Camden's appeal. It was further ordered, however, that Camden file a bond in the amount of $25,000 conditioned upon the payment to Delaware Valley of all loss and damage suffered by it as a result of the delay in receiving the certificate of authority in the event that Camden's appeal is ultimately unsuccessful (R. 109).

[4] The difference between Judge Bastian and the majority of the court of appeals was not over the legal point decided by the court, but rather upon a different interpretation of the facts of the case

The judgment of the court of appeals was rendered on January 18, 1962. Thereafter, Camden filed a timely petition for rehearing *en banc* which was denied on February 20, 1962, two judges dissenting.[5]

ARGUMENT

Petitioner is a state bank which by this suit seeks to avoid the competition of a bank lawfully organized pursuant to the express terms of the National Bank Act, 12 U.S.C. 21-28. Beyond the economic importance of the case to petitioner and to the potentially competitive Intervenor, there is involved no issue of overriding public importance or significance which calls for this Court's review. There is no conflict of decisions, not just because the Comptroller may be sued only in the District of Columbia (see Pet. 12), but because no state bank has ever before suggested in a suit against the Comptroller or against a national bank, suable where it does business, that a partial common stock ownership between two or more national banks and common directors of national banks makes one or the other a "branch bank" subject to state geographical limitations applicable to the establishment and operation of branch banks.

1. On the merits, petitioner seeks to superimpose upon the Comptroller's unquestioned authority to char-

[5] On February 23, 1962, Camden moved for a stay of the court of appeals' mandate pending the filing of a petition for a writ of certiorari in this Court. The motion was opposed by the Comptroller and the Intervenor. By order, dated March 20, 1962, the motion was denied by the court of appeals. A similar application for stay of issuance of the mandate was made to this Court, and, by order dated April 4, 1962, was denied by Mr. Justice Clark.

ter a new bank (Pet. 3) the limitations of New Jersey law applicable to the establishment of branch banks (N.J. Stat. Ann. 17:9A15).

Petitioner argues that the newly organized Delaware Valley National Bank is a "branch bank" and, hence that the state limitations, adopted by way of 12 U.S.C. 36(c) (App., *infra*, p. 16), serve to limit the Comptroller's authority to charter a new bank, as authorized by 12 U.S.C. 21-28. The court below was clearly correct in rejecting petitioner's novel arguments. The Delaware Valley National Bank, neither in fact nor in law, is or could be a "branch bank" of the Haddonfield National Bank, as petitioner suggests. Thus as the court of appeals held, the limitations of 12 U.S.C. 36 and of New Jersey law upon the establishment of branch banks have "no applicability to the situation disclosed on this record * * *" (Pet. App. 7a).[6]

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[6] The decision of the court below that 12 U.S.C. 36 is inapplicable to this case, is consistent with a recent decision of the Court of Appeals for the Fifth Circuit, *State of Texas* v. *National Bank of Commerce of San Antonio*, 290 F. 2d 229, certiorari denied, 368 U.S. 832.

The *amicus* National Association of Supervisors of State Banks, takes the position that the question whether Delaware Valley is a "branch" of Haddonfield National must be resolved by reference to the law of the State of New Jersey. The *amicus* Association argues (Br. 9):

> Each State must decide, on the basis of its own branch banking laws, the circumstances under which a chain bank would contravene those laws, and the views of the various States may differ, which is to be expected because of the wide variety of legislative purposes expressed in the varying State branch banking laws. Once a State has declared itself, however, as New Jersey has done in the instant case on the advice of its Attorney General, and has held that a particular chain bank ap-

Petitioner urges here (Pet. 10), as it did below, that "form" should be disregarded and that the "substance of the transaction" recognized. But even apart from the independent corporate "form" of Delaware Valley, the substance of the transaction is that Delaware Valley is not and could not be a "branch bank" of Haddonfield National. The capital structure of Delaware Valley is totally independent of that of Haddonfield National; the stock of Delaware Valley has been subscribed to and "paid in" as required by 12 U.S.C. 53; the Comptroller has assigned a name to Delaware Valley that is not susceptible of confusion with Haddonfield National; Delaware Valley will be located approximately two miles from the main office of Haddonfield National (R. 15, 6); the general business of banking to be conducted by Delaware Valley will "be transacted in the place specifed in its organization certificate" (12 U.S.C. 81); deposits with Delaware Valley will be

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proach violates the State branching law, the Comptroller is bound to follow that construction.

Significantly, neither the petitioner nor the *amicus* State of New Jersey join in this argument. They apparently recognize that 12 U.S.C. 35(c), which makes state law applicable to determine whether a national bank can establish a branch, only applies when a proposed facility is a "branch" as a matter of federal law. Indeed, 12 U.S.C. 36(f) (App., *infra*, p. 16), specifically defines the inclusive scope of the term "branch" as used in 12 U.S.C. 36(c), as a matter of federal law.

With respect to the views of the State of New Jersey, suffice it to say that, although after the inception of this litigation the Commissioner of Banking and Insurance of New Jersey took the view that the new facility would be a forbidden branch under New Jersey law, nevertheless, in 1958, the Commissioner approved an application for a state bank charter for the State Bank of Rahway under factual circumstances strikingly similar to those in the present case (R. 97-101).

its own liability, not that of Haddonfield National; loan limitations on Delaware Valley will be those applicable to an independent bank, based on its own capital structure and totally independent of loan limitations applicable to Haddonfield National (see 12 U.S.C. 84); the limits of indebtedness which may be incurred by Delaware Valley will be as prescribed in 12 U.S.C. 82 and will be independent of similar limitations on Haddonfield National; the directors of Delaware Valley have been elected by its shareholders (see 12 U.S.C. 71), meet the citizenship, residence, and stock-ownership requirements specified in 12 U.S.C. 72. Compliance with these provisions is insured by 12 U.S.C. 93, which provides that "If the directors * * * shall knowingly violate, or knowingly permit any of its officers, agents, or servants * * * to violate any of the provisions of [12 U.S.C. 21-214c], all the rights, privileges, and franchises of the association shall be thereby forfeited * * *."

From the foregoing enumeration, it is impossible to say that the Comptroller, in approving the application of Delaware Valley, has approved, in any sense whatsoever, a branch of Haddonfield National or that Delaware Valley could be conducted as a branch were its management disposed to do so. In the 31 years that national banks have been authorized to establish and operate "branches," petitioner is the first of the many thousand banks in the competing state banking systems to suggest that an affiliate bank and a branch bank are legally the same and that 12 U.S.C. 36 and state law operate as a limitation on the Comptroller's

charter authority or limit the authority of an affiliate bank to conduct the business of banking.[7]

2. The distinctions between branch and chain or affiliate banking have been long recognized by Congress, and there is no indication that Congress either equates or confuses the two systems as petitioner seeks to do.[8] By the Banking Act of 1933, in which Congress broadened the authority of national banks to establish and operate branch banks, Congress also legislated specifically with respect to "affiliates" of national banks and other member banks of the federal reserve system. Contrary to petitioner's view (Pet. 14-19), Congress by that Act never intended to subject affiliation by national banks to the state limitations and restrictions applicable to branch banking. See, *e.g.*, Secs. 2, 13, 20, 27, 28(a), (b), of the Banking Act of 1933, 12 U.S.C. 221a, 371c, 377, 161, 481.

Furthermore, Section 8 of the Clayton Act, 15 U.S.C. 19, and Regulation L of the Board of Governors of the Federal Reserve System, 12 C.F.R. Part 212, are also important in demonstrating statutory recognition

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[7] That the Comptroller's office has never considered 12 U.S.C. 36 as a limitation of his authority is evidenced by the fact that the official records of the office disclose that Comptrollers of the Currency have for many years approved applications for the chartering of new national banks affiliated with existing banks (R. 96).

[8] In the debates preceding the passage of the Banking Act of 1933, Senator Carter Glass stated (76 Cong. Rec. 1998):

> Mr. President: There may now be established chain and group banking systems. There are many such systems. I am not addressing myself to anybody whose confusion of mind is such that he can not differentiate a chain and group banking system from a branch banking system. They are, of course, entirely different. * * * There is no law against chain and group banking. * * *

of national bank affiliation. These provisions prohibit interlocking directors, officers and employees of member banks of the Federal Reserve System, but contain a number of exceptions, one of which permits such interlocking relationship for banks "more than 50 per centum of the common stock of which is owned directly or indirectly" by the same persons (15 U.S.C. 19(4); see 12 C.F.R. 212.2(d)(4)).

The recent Bank Holding Company Act of 1956, 12 U.S.C. 1841-1848, also indicates an intention by Congress to treat affiliates differently from branch banks. As introduced and passed by the House of Representatives, H.R. 6227, 84th Cong., 1st Sess., which became the Bank Holding Company Act of 1956, contained a provision that no application should be approved which would permit

> (2) any bank holding company or any subsidiary thereof to acquire, directly or indirectly, any voting shares of, interest in, or all or substantially all of the assets of any additional bank, except (i) within geographic limitations that would apply to the establishment of branches of banks under the statute law of such State, or (ii) unless such acquisition is at the time authorized by the statute law of such State by language specifically granting such authority affirmatively, and not merely by implication.

The Senate rejected this provision and adopted instead a provision which confined bank holding company operations to a single state, except where state

law expressly permits out-of-state holding companies. The Senate version ultimately became law (Sec. 3(d) of the Bank Holding Company Act of 1956, 12 U.S.C. 1842(d)). In explaining this section on the floor of the Senate, Senator Robertson, Sponsor and Manager of the legislation, stated (102 Cong. Rec. 6753):[9]

> The committee also decided against the inclusion of a provision in the bill which would automatically apply State laws concerning branch banking to bank-holding company operations. This provision was contained in the House bill and was advocated by the Independent Bankers Association. A bank branch is, by form, ownership, and functions, vastly different from a bank-holding company affiliate.

[9] At this point Senator Robertson inserted into the Record a chart (see 102 Cong. Rec. 6753-6754), prepared by the American Bankers Association showing clearly the many differences between branch banking and holding company operations in such factors as corporate organization, stockholders, supervision, board of directors, management, capital structure, deposits, loan limits, loanable funds, and termination.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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MAY, 1962.

APPENDIX

The National Bank Act, as amended, 12 U.S.C. 21, *et seq.*, provides in relevant part as follows:

12 U.S.C. 21:

Associations for carrying on the business of banking under this chapter may be formed by any number of natural persons, not less in any case than five. They shall enter into articles of association, which shall specify in general terms the object for which the association is formed, and may contain any other provisions, not inconsistent with law, which the association may see fit to adopt for the regulation of its business and the conduct of its affairs. These articles shall be signed by the persons uniting to form the association, and a copy of them shall be forwarded to the Comptroller of the Currency, to be filed and preserved in his office.

12 U.S.C. 24:

Upon duly making and filing articles of association and an organization certificate a national banking association shall become, as from the date of the execution of its organization certificate, a body corporate, and as such, and in the name designated in the organization certificate, it shall have power—* * *

12 U.S.C. (Supp. III) 26:

Whenever a certificate is transmitted to the Comptroller of the Currency, as provided in this chapter, and the association transmitting the same notifies the comptroller that all of its capital stock has been duly paid in, and that such association has complied with all the provisions of this chapter required to be complied with before an association shall be author-

ized to commence the business of banking, the comptroller shall examine into the condition of such association, ascertain especially the amount of money paid in on account of its capital, the name and place of residence of each of its directors, and the amount of the capital stock of which each is the owner in good faith, and generally whether such association has complied with all the provisions of this chapter required to entitle it to engage in the business of banking; and shall cause to be made and attested by the oaths of a majority of the directors, and by the president or cashier of the association, a statement of all the facts necessary to enable the comptroller to determine whether the association is lawfully entitled to commence the business of banking.

12 U.S.C. 27:

If, upon a careful examination of the facts so reported, and of any other facts which may come to the knowledge of the comptroller, whether by means of a special commission appointed by him for the purpose of inquiring into the condition of such association, or otherwise, it appears that such association is lawfully entitled to commence the business of banking, the comptroller shall give to such association a certificate, under his hand and official seal, that such association has complied with all the provisions required to be complied with before commencing the business of banking, and that such association is authorized to commence such business. But the comptroller may withhold from an association his certificate authorizing the commencement of business, whenever he has reason to suppose that the shareholders have formed the same for any other than the legitimate objects contemplated by this chapter.

12 U.S.C. 36 provides in pertinent part:

(c) A national banking association may, with the approval of the Comptroller of the Currency, establish and operate new branches: (1) Within the limits of the city, town or village in which said association is situated, if such establishment and operation are at the time expressly authorized to State banks by the law of the State in question; and (2) at any point within the State in which said association is situated, if such establishment and operation are at the time authorized to State banks by the statute law of the State in question by language specifically granting such authority affirmatively and not merely by implication or recognition, and subject to the restrictions as to location imposed by the law of the State on State banks. * * *

* * * * * *

(f) The term "branch" as used in this section shall be held to include any branch bank, branch office, branch agency, additional office, or any branch place of business located in any State or Territory of the United States or in the District of Columbia at which deposits are received, or checks paid, or money lent.

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